NATIONAL LABOR RELATIONS BOARD

CAYUGA MEDICAL CENTER AT ITHACA, INC., Respondent - and - 1199 SEIU, UNITED HEALTHCARE WORKERS EAST, Charging Party	Case Nos.	03-CA-156375 03-CA-159354 03-CA-162848 03-CA-165167 03-CA-167194

RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION WITH SUPPORTING ARGUMENT

Respectfully submitted,

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I. PRELIMINARY STATEMENT

The Respondent Cayuga Medical Center at Ithaca, Inc. ("CMC" or "Hospital"), respectfully submits the following Exceptions with Supporting Argument to the Decision and Recommended Order of Administrative Law Judge David I. Goldman dated October 28, 2016, in the above-captioned case.[1]

The consolidated Amended Complaint (referred to hereafter as "Complaint") alleged that CMC committed a laundry list of alleged garden-variety violations of Section 8(a)(1) in connection with a year-long campaign by the Charging Party, 1199 SEIU United Healthcare Workers East ("Union"), to organize CMC nurses. Contrary to the ALJ's findings and conclusions, the evidence in the record establishes that the General Counsel either failed to carry its burden of proof or that the actual facts do not support the finding of any violations. Instead, although ignored by the ALJ, the overwhelming evidence reveals that pro-union employees were freely permitted to solicit their co-workers throughout CMC's facility over the course of many months; that no one was ever counseled or disciplined for pro-union solicitation/distribution; and that CMC consistently recognized and explicitly acknowledged in multiple written communications to the nurses that the choice belonged to them and that this was their right under federal law.

The Complaint also alleged that CMC violated Section 8(a)(3) in connection with certain disciplinary actions taken against two known union supporters. However, the contemporaneous documentation and overwhelming credible evidence establishes that

[1] Judge Goldman will be referred to hereafter as "ALJ", and his October 28, 2016 decision as "ALJ's Decision". References to the record evidence with refer to the hearing transcript as "Tr." followed by the applicable page number(s); and to the General Counsel's exhibits as "GC-Ex." and the Respondent's exhibits as "R-Ex." followed by the applicable exhibit number and page number(s) of said exhibits where indicated.

each such action represented an entirely legitimate response to employee misconduct; that CMC's actions were supported by consistent past practice pre-dating any union activity; and that the record is devoid of any evidence of a discriminatory or retaliatory motive, nor of any anti-union animus from which such a motive could reasonably be inferred. Rather, the record evidence establishes that in each instance the discipline was triggered by one or more clear acts of misconduct, and that if anything CMC bent over backwards and exercised restraint to avoid the implication or appearance that union support had any bearing on the matter.

The ALJ's Decision to the contrary is not supported by substantial evidence, and flies in the face of both the clear evidence and established principles of law. The ALJ has rendered a decision in this case that is patently biased and uses result-oriented reasoning to support it. Particularly with respect to the Section 8(a)(3) issues involving nurse Anne Marshall, the ALJ ignored the burden of proof; ignored the overwhelming contemporaneous documentary evidence; ignored the credible and consistent testimonial evidence of multiple witnesses; and for reasons that are not explained and are not supported by a fair and impartial view of the record, instead credited the self-serving testimony of Ms. Marshall, while ignoring key factors normally used to assess credibility that clearly undermined the credibility of her testimony.

Therefore, for the reasons discussed in more detail below, we respectfully request that the ALJ's Decision be reversed and that the Complaint be dismissed in its entirety.

II. BACKGROUND INFORMATION

CMC has been serving the people of Ithaca, New York, Tompkins County, and the surrounding communities for over 125 years. (Tr. 786). It has grown to become a large complex organization with over 1350 employees who are dedicated to providing quality care. Notwithstanding the unfounded assertions of Counsel for the General Counsel in her opening statement that CMC has inadequate staffing and burned out nurses resulting in unsafe conditions, the truth is that CMC is the only hospital in the entire Central New York Region stretching from the Pennsylvania to Canadian borders, west to Geneva and Corning, and east to Albany and Cooperstown, that received a Hospital Safety Score of "A" by a reputable national survey, while most of the other regional hospitals received "Cs" and "Ds". (See R-Ex. 5; Tr 786-88). As in every 24/7 healthcare facility across New York State and across the nation, however, staffing is a constant challenge because patient census and patient acuity are always fluctuating. Like all healthcare facilities, CMC staffs to a median and flexes up or down based on patient needs at any given point. (Tr. 790-91).

The Union's campaign to organize approximately 350 registered nurses began in early 2015 and continued through the time of the May 2016 hearing in this case; however, at no point has the Union filed a petition for an election. The alleged unfair labor practices purportedly occurred between January and November 2015.[2] The ALJ's biased view of the evidence ignored CMC's proven efforts throughout the relevant time period to respect the Section 7 rights of all employees, including those who favor unionization and those who do not (Tr. 792-94), and similarly ignored the fact that a

[2] All dates referred to herein were in 2015 unless otherwise noted.

constant theme in CMC's written communications to the nurses about the union campaign was that, "[a]s employees of CMC, [nurses] have the right to advocate in favor of a union; [nurses] also have the right to advocate against union representation (within the guidelines of [CMC's] existing solicitation policy requiring that solicitations only occur between employees during non-work time), [and that CMC] respects these rights regardless of [each nurse's] viewpoint on this subject." (See GC-Ex. 2c and GC-Ex. 2j).

III. EXCEPTIONS WITH SUPPORTING ARGUMENT

A. Respondent Takes Exception to the Legal Conclusion That Selected Portions of Its Nursing Code of Conduct violated Section 8(a)(1).[3]

CMC maintains a Nursing Code of Conduct ("Code") that prohibits disrespectful or intimidating behavior toward others, as well as criticism of co-workers or other staff in the presence of others in the workplace and/or patients. (GC-Ex. 3). It is undisputed that the Code was established several years before any union organizing activity and in fact was written by an internal committee of staff nurses. (Tr. 774-75).

After properly rejecting the General Counsel's arguments that certain other portions of the Nursing Code of Conduct ("Code") violated Section 8(a)(1), the ALJ erroneously concluded that certain other statements in the Code were unlawful.

CMC submits that this type of professional code of conduct does not violate Section 8(a)(1) merely because it is written in broad terms. The notion that nurses should generally engage in professional, courteous and respectful interactions with others in the performance of their duties reflects longstanding and nationally recognized

[3] See ALJ's Decision, Section B, pages 3-10; more specifically, see pages 8-10.

standards for the nursing profession, not to mention common sense and societal norms of civility. (Tr. 775-76; ee also GC-Ex. 3, p.1 under "Supporting Data") There is nothing in the Code of Conduct that prevents nurses from complaining about their terms and conditions of employment or otherwise engaging in protected concerted activity.

Furthermore, the Code of Conduct as written does not reference supervisors or managers at all. The entire thrust of the policy involves proper behavior of nurses in the performance of their duties and their treatment of fellow co-workers, customers/patients and others such as family/visitors. Such requirements regarding courteous, professional and respectful behavior toward fellow employees and guests does not violate the NLRA. *See Copper River of Boiling Springs*, 360 NLRB No. 60, *64-68 (2014) (distinguishing employment practices directed at behavior toward management as opposed to those directed at behavior toward co-workers and customers).

In finding a violation, the ALJ focused on two particular statements in the Code of Conduct as written several years earlier by staff nurses:

> **People**
>
> Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation.
>
> **Community**
>
> Inappropriate and disruptive communications/behaviors include but are not limited to:
>
> > Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive.
> >
> > Criticizes coworkers or other staff in the presence of others in the workplace or in the presence of patients.

With respect to the first above-quoted statement, the ALJ erroneously concluded that the "utilizes proper channels to express dissatisfaction" language would reasonably be interpreted by employees as prohibiting them from complaining in other ways and thus chills their Section 7 rights. This is nonsense. Language written in very general terms indicating that established channels do exist for expressing disagreement with policy and/or with management action does not precluded employees from expressing such views in other ways, nor is there evidence that anyone was retaliated against for doing so, nor placed in fear of retaliation, nor otherwise felt constrained in exercising Section 7 rights based on the policy's broad reference to "proper channels"; nor would a reasonable employee infer such meaning from a statement that essentially welcomes such criticism complete with an explicit assurance that employees who voice such criticism will not suffer and need not worry about any retaliation. The ALJ's tortured analysis ignores the entire thrust of the policy statement – i.e. that employees have a protected right to complain; and instead twists the meaning 180 degrees by inferring an intention to shut down and punish employees who express dissatisfaction outside established channels. There is no foundation in fact for ascribing such meaning to the language, nor would a reasonable employee do so, since reasonable minded employees do not parse words to find hidden meaning in a sentence that clearly communicates a right to disagree/complain about policy/supervisory actions. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), citing *Lafayette Park Hotel*, 326 NLRB 824, 827 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) ("in determining whether a challenged rule is unlawful, the Board must…give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.").

With respect to the second above-quoted statement in the Code of Conduct, the ALJ adopts a radical view of the law that in a professional patient-centered acute care setting Section 7 creates an affirmative right to engage in personal attacks and hyperbole directed against other staff members in the presence of patients or other staff, including the right to use language that is insulting, disrespectful, dismissive or demeaning. This line of reasoning stretches sound legal principles to an absurd extreme. It is one thing to afford individuals with latitude to account for passionately-held views and/or emotionally-charged circumstances such as in the context of a union steward arguing his/her case in support of a grievance or persons engaging in a formal protest such as marching on a picket line; but it is quite something else to construe a generalized policy statement written by employees that endorses a basic degree of decency and civility in their desired workplace interactions into a sinister attempt to deny or infringe upon the general right to complain about workplace issues.[4] A bureaucratic and/or legalistic mindset should not be allowed to dispense with common sense and with basic societal standards of decency. Finally, we disagree with the ALJ's poorly-reasoned attempt to distinguish the Board's decision in *Palms Hotel & Casino*, 344 NLRB 1363 (2005) (holding as lawful a rule prohibiting employees from engaging in "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees or patrons) in footnote 9 on page 9 of the ALJ's Decision.

For these reasons, we respectfully request that the ALJ's conclusion that CMC's Nursing Code of Conduct violated Section 8(a)(1) of the Act be reversed and that this portion of the Complaint be dismissed.

[4] See *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011) ("as in 8(a)(1) cases generally, [the Board's] task is to determine how a reasonable employee would interpret the action or statement of her employer, **and such a determination appropriately takes account of the surrounding circumstances**") (emphasis added) (citation omitted).

B. Respondent Takes Exception to the Legal Conclusion that Certain Statements in Written Communications on May 7 and August 26 Violated Section 8(a)(1).[5]

The ALJ erroneously concluded that two emails from CMC's Vice President of Human Resources Alan Pedersen to CMC nurses violated Section 8(a)(1) because they contained the statements below.

> May 7 email:
>
> "If you feel you are being harassed or intimidated feel free to contact your supervisor, director or security."
>
> (GC-Ex. 2(a)).
>
> August 26 email:
>
> "If you feel that you continue to be harassed you have every right to file a complaint in our incident reporting system, and notify your Director so that we can address the behavior with the individual involved."
>
> (GC-Ex. 2(f)).

Mr. Pedersen provided uncontroverted testimony that a number of CMC employees complained about being pressured to sign a union authorization card. (Tr. 798-99). The Board has held that employer communications relating to legitimate threats and harassment have been found not to violate the Act. *See e.g., Ithaca Industries,* 275 NLRB 1121, 1126 (1985) (it was lawful for an employer to tell employees that they should report coworkers who "intimidate" them while soliciting cards); *First Student, Inc.*, 341 NLRB 136 (2004) (employer's request to report incidents where employees were confronted and forced or intimidated into supporting the union was lawful).

[5] See ALJ's Decision, Section C.1, pages 10-13.

Furthermore, unlike the communications in *Ithaca Industries* and *First Student*, the above statements contained in Mr. Pedersen's emails are not specifically directed at harassment or intimidation by pro-union employees, but rather were broadly written to cover any harassment/intimidation by persons favoring the Union and/or by persons opposing the Union. Furthermore, the statements should be considered in context. In his June 25 email to nurses, Mr. Pedersen stated that, "[a]s employees of CMC, you have the right to advocate in favor of a union; you also have the right to advocate against union representation …. We respect these rights regardless of your viewpoint on this subject." (GC-Ex. 2(c)). This exact same message was repeated in Mr. Pedersen's July 15 email to nurses. (GC-Ex. 2(j)). Similarly, in his August 23 email to nurses, Mr. Pedersen stated that, "[a]s employees of CMC, you have the right to advocate in favor of a union; you also have the right to advocate against union representation…." (GC-Ex. 2(e)). Likewise, in his November 13 email to nurses, Mr. Pedersen stated that, "[w]hile those who are in favor of organizing have a right to communicate, those who are opposed to unionization have the same right." (GC-Ex. 2(i)). What is clear from the May 7 and August 26 emails is that the right to communicate/advocate does not include the right to harass or intimidate, without regard to the viewpoint being communicated or advocated.

The ALJ's reliance on several Board cases finding a violation is misplaced. Ironically, despite noting "the careful assessment of wording that the Board engages in when considering such claims," and observing that "[t]he distinctions drawn by the Board in this area can seem fine" (ALJ's Decision p. 12), the ALJ disregards the neutral wording used in Mr. Pedersen's emails, as well as the context wherein he repeatedly communicated that employees have the equal right to adopt and support a pro-union or

anti-union viewpoint, the ALJ cites in support of his legal conclusion against CMC a number of cases where, unlike here, the employer explicitly referenced pro-union activity. See, e.g. *Bloomington-Normal Seating Co.,* 339 NLRB 191, 191 fn. 2 (2003) (management unlawfully told employers to report if they were "threatened or harassed about signing a union card"); *Niblock Ecavating, Inc.,* 337 NLRB 53, 61 (2001) (employer statements directed at "union card solicitors"); *Greenfield Die & Mfg. Corp.,* 327 NLRB 237, 238 (1998) ("The Board has held that employers violate Section 8(a)(1) of the Act when they invite their employees to report instances of fellow employees' bothering, pressuring, abusing or harassing them with union solicitations")

For these reasons, we respectfully request that the ALJ's conclusion that Mr. Pedersen's May 7 and August 26 emails violated Section 8(a)(1) of the Act be reversed and that this portion of the Complaint be dismissed.

C. Respondent Takes Exception to the Legal Conclusion that It Violated Section 8(a)(1) by Initially Stating to Employees on or about July 8 that Tabling on Behalf of the Union in the Cafeteria Was Not Permitted.[6]

The ALJ erroneously concluded that on or about July 8 CMC unlawfully interfered with tabling on behalf of the Union in the facility's cafeteria. This conclusion is predicated on two instances when Mr. Pedersen first observed this activity and stated to one employee on the first occasion and another employee on the second occasion that he did not believe their display was appropriate, which prompted the first employee to leave a few minutes before the end of her meal period, and to which the second

[6] See ALJ's Decision, Section C.2, pages 13-15.

employee responded that he was within his rights and therefore would not shut down.[7] In neither instance was there any confiscation of materials or threat of discipline. Most importantly, upon further review of the issue, management adopted a hands-off approach and freely allowed the same employees and other pro-union employees to engage in tabling in the cafeteria on a frequent basis and multiple occasions over the ensuing days, weeks and months without any disciplinary or other adverse consequences

More specifically, Mr. Pedersen testified that upon first encountering employee Anne Marshall sitting at the entrance to the cafeteria with all of her union materials, he told her that she "really shouldn't be doing that here," after which she picked up her materials and left. (Tr. 60-61). A day or two later upon encountering employees Scott Marsland and Erin Bell inside the cafeteria with two tables pulled together and union literature spread across the two tables, Mr. Pedersen again told them that they shouldn't be doing that here. (Tr. 61) The cell phone video of the encounter and resulting transcript reveal that Mr. Pedersen actually said, "You're not allowed to set up a fixed presence in the cafeteria. You can, if you want to talk and solicit and have conversations with people, you can do that. You are not allowed to do this." Mr. Marsland responded that the union had informed him he had a right to do this, to which Mr. Pedersen disagreed, and said, "So I'll have security come and take this away then." Mr. Pedersen reiterated that maintaining a fixed presence was inappropriate, to which Mr. Marsland responded that that was not his understanding of the law, and that maybe

[7] Mr. Pedersen testified that in his 28 years the only tabling that occurred in the cafeteria was by the Hospital's own Auxilliary and by its health insurance carrier, and in those instances the table was off to one side and halfway down the length of the cafeteria; whereas when he first encountered tabling on behalf of the organizing campaign the employees had positioned themselves right in the front entrance to the cafeteria such that everyone using the cafeteria had to go around or pass directly by their table which he viewed as inappropriate. (Tr. 799-802).

some clarification was needed. Mr. Pedersen simply responded, "Okay", and that was the end of the interaction. (See GC-33a and 33b). Mr. Marsland and Ms. Bell did not leave or remove their materials (Tr. 519-521), nor did Mr. Pedersen call security or otherwise attempt to confiscate or remove any materials (Tr. 63), nor did Mr. Pedersen threaten any discipline or other adverse action (Tr. 64) (contrary to Counsel for the General Counsel's characterization that Mr. Pedersen threatened Mr. Marsland (see Tr. 61). Mr. Marsland testified that he and Ms. Bell stayed and continued tabling for about an hour after their brief interaction with Mr. Pedersen. (Tr. 519).

Thereafter, Mr. Pedersen consulted with labor counsel and determined that CMC would take a hands-off approach to tabling in the cafeteria by Union proponents. (Tr. 63). It is undisputed that tabling continued on multiple occasions thereafter over a period of several months on a very frequent basis. (Tr. 63-64).

The ALJ starts his analysis on page 14 of his Decision by citing cases standing for the proposition that an prohibitions against employee solicitation during nonworking time in nonworking areas is presumptively unlawful; yet the record evidence and the ALJ's own findings make clear no such prohibition existed in this case, but rather as the ALJ also strated on page 14 "[t]he tabing continued sporadically, but repeatedly over the course of the next few months" without challenge from management. Furthermore, as noted above, Mr. Pedersen's initial concern was based on the unprecedented and disruptive placement of the pro-union tabling at the very entrance to the cafeteria, as opposed to seeking to impose an outright ban on any such activity.[8]

The ALJ's finding and conclusion that CMC failed to expressly repudiate it's initial stance by specifically telling the employees first spoken to that continued tabling would

[8] At the very outset of his Decision, the ALJ noted that CMC "permit[ed] a significant amount of union activity . . . ." (ALJ's Decision, p. 1).

be permitted, and that such failure results in a violation of Section 8(a)(1), disregards relevant uncontroverted evidence resulting in a flawed legal conclusion. While it is undisputed that Mr. Pedersen did not personally speak with Marshall, Marsland or Bell following the determination to allow the tabling, by his email to all registered nurses dated July 15 Mr. Pedersen did in fact address the issue and make clear that such activity would be allowed, first referring to “an increase in visibility by those in favor of creating a union for nurses,” and then stating while CMC disagrees with their viewpoint, “we have respected their right to make their opinion known” (i.e. by not questioning continued tabling in the ensuing days after the initial encounters). (GC-Ex. 2(j)).

It is crystal clear from the video and transcript that Mr. Marsland was not intimidated or discouraged from continuing to engage in tabling following his initial encounter with Mr. Pedersen, and although Ms. Marshall left after her encounter with Mr. Pedersen this occurred at or about the end of her meal period when she had to return to work anyway. Marsland and Marshall both testified that they were not discouraged from further tabling and that they both did this, along with other employees, on multiple occasions thereafter. (Tr. 519-521; 276-278, 280-285).

The Board has made clear that there must be more than one episode of discriminatory enforcement of a no solicitation/distribution rule in order for there to be a finding of disparate treatment and objectionable conduct. *See, e.g., Avondale Industries*, 329 NLRB 1064, 1231 (1999) ("single instance . . . does not prove disparate treatment"); *Albertsons, Inc.*, 289 NLRB 177, 178 fn. 5 (1988) (disparate application of rule not shown by isolated instances); *Kendall Co.*, 267 NLRB 963, 965 (1983) (disparate enforcement of policy not shown by isolated deviations). *Uniflite, Inc.,* 233 NLRB 1108, 1111 (1977).

Finally, because there was no discipline issued for the conduct of employees tabling on behalf of the organizing campaign, and such conduct was allowed to continue indefinitely throughout the campaign, to the extent CMC's initial response represents a violation, such violation was fully remedied and *de minimis* and does not require any corrective action. *Dieckbrader Express, Inc.*, 168 NLRB 867 (1967) (inconsequential violation insufficient to warrant violation of the Act).

For these reasons, we respectfully request that the ALJ's conclusion that Mr. Pedersen's initial response to the cafeteria tabling on or about July 8 constitutes a violation of Section 8(a)(1) of the Act be reversed and that this portion of the Complaint be dismissed.

D. Respondent Takes Exception to the ALJ's Finding and Conclusion that It Unlawfully Informed Employees that It Was Inappropriate to Discuss Their Salaries and/or Wages.[9]

The ALJ's found that at some unspecified time during the Section 10(b) period, Mr. Pedersen stated to a group of approximately five employee nurses that it was inappropriate to discuss their wages with one another and to refrain from doing so, and concluded that this purported directive violated the Act. The ALJ's finding and conclusion with respect to this issue is disturbing on many levels.

For one thing, the ALJ's Decision is devoid of any mention that he considered the burden of proof, which of course, rested squarely with the General Counsel to establish a violation. In her opening statement, Counsel for the General Counsel contended that CMC effectively maintained an unlawful rule requiring employees to keep information

[9] See ALJ's Decision, Section C.3, pages 15-16.

about their wages confidential. However, the General Counsel failed to produce evidence supporting either the specific allegation set forth in the Amended Complaint or the existence of such a policy or rule. Under examination by Counsel for the General Counsel pursuant to Rule 611(c) of the Federal Rules of Evidence, Mr. Pedersen testified that he had not told any employees to keep salary information confidential. (Tr. 47-48). In attempting to prove the existence of a policy or rule prohibiting the sharing of wage information, the General Counsel relied upon a 5-year old letter requesting nursing staff to refrain from discussing a particular salary adjustment with other non-nursing staff since the special salary adjustment on that occasion was limited to nursing staff only. (GC-Ex. 5 and 6). Aside from being 5 years old, this letter clearly did not request or prevent nurses from speaking to one another about their pay; nor did it state that sharing this information with non-nursing personnel was prohibited; nor did it suggest in any way that employees could be disciplined for sharing the information. Rather, it simply requested that nurses exercise discretion in talking about the special pay increase with other non-nursing employees to whom the special pay increase did not apply. (Tr. 49). Upon further examination as part of the Respondent's case, Mr. Pedersen testified that there is no policy or rule prohibiting employees from discussing their wages. (Tr. 803-04).

Thus, the General Counsel failed to carry its burden of proof with respect to this charge, and accordingly the ALJ should have dismissed the charge. Instead of doing so, without even mentioning any of the foregoing information, the ALJ relied upon the uncorroborated testimony of a single employee witness, Anne Marshall, who claimed that at some unspecified time, when Mr. Pedersen was walking by her unit in the course of his normal rounds, he supposedly overheard a group of nurses talking about their pay

and told them to stop doing so. In addition to his testimony noted above and completely ignored by the ALJ that CMC has no policy or rule prohibiting such discussions, when asked about Ms. Marshall's claim, Mr. Pedersen testified that he had no recollection of any such conversation. Despite stating that he found Mr. Pedersen to be a credible witness, based on the simple fact that Mr. Pedersen acknowledged that he does rounds, the ALJ concluded that although Mr. Pedersen doesn't recall, the conversation described by Ms. Marshall likely did happen.

It is undisputed that Ms. Marshall played a leading role in the Union's organizing campaign from the outset, and many of the issues discussed in detail below with respect to Respondent's other Exceptions to the ALJ's Decision directly involve Ms. Marshall. Clearly, Ms. Marshall had a huge stake in the outcome of this case and had a strong motive to embellish and/or fabricate evidence against the Respondent through her testimony. Her general lack of veracity is discussed in detail below with respect to the additional Respondent Exceptions, but as to this allegation she could not produce any specifics about when the purported statement by Mr. Pedersen occurred; nor did the General Counsel produce any contemporaneous notes or other documentary evidence; nor did the General Counsel call any of the other nurses who purportedly heard this to corroborate Ms. Marshall's testimony. Remarkably, in footnote 16 on page 16 of his Decision, the ALJ states that he considered the fact that none of the other nurses who were purportedly present were called to testify about this alleged event, but he asserts that this factor "cuts both ways [since] either party could have attempted to find corroborating witnesses for their position." The ALJ's statement is remarkable because it ignores the fact that Mr. Pedersen recalls no such conversation ever happening; whereas Ms. Marshall never claimed another supervisor or manager was

present, and Ms. Marshall could not identify any of the other nurses who were supposedly present.

Given the lack of detail from Ms. Marshall; the absence of any corroborating evidence to support this claim; the credible countervailing testimonial evidence presented by Mr. Pedersen; and the General Counsel's attempt to use a 5-year old letter that also upon close examination provided no support for her opening contention; a fair and impartial decision maker should have concluded with respect to this issue that the General Counsel failed to meet its burden of proof. The ALJ's failure to even mention the burden of proof, along with the lack of substantial credible evidence to support his finding, should result in a reversal of his Decision on this issue.

For these reasons, we respectfully request that the ALJ's conclusion that Mr. Pedersen's issued an unlawful directive to refrain from discussing wages during the Section 10(b) period be reversed and that this portion of the Complaint be dismissed.

E. Respondent Takes Exception to the ALJ's Finding and Conclusion that During a One-on-One Meeting on May 8 an Employee Was Unlawfully Interrogated and Threatened with Unspecified Reprisals.[10]

The primary evidence introduced by the General Counsel in support of Paragraphs 8(a) & (b) of the Complaint was testimony from one witness, Anne Marshall, about a single instance of alleged interrogation and threats. Her testimony was directly contradicted by testimony from her supervisor at the time, the then Interim Director of the Intensive Care Unit ("ICU"), Joel Brown. The ALJ's Decision to credit Ms. Marshall's testimony over Mr. Brown's is stunning in light of the relevant evidence in the record and in light of the ALJ's own reasoning as set forth in his Decision. Contrary to the ALJ's

[10] See ALJ's Decision, Section D.1, pages 16-20.

Decision, we respectfully submit that a fair and impartial factfinder could only conclude that Ms. Marshall's testimony lacked credibility; whereas Mr. Brown gave credible testimony that is corroborated by other evidence in the record. The significance of the ALJ's error in this regard is pivotal to the central Section 8(a)(3) allegations discussed below, as his unsubstantiated finding of employer animus toward Ms. Marshall's union activity provides the linchpin for his remaining adverse findings and conclusions against the Respondent, none of which are supported by substantial evidence in the record.

It is undisputed that in April in his capacity as Interim Director of the ICU, Mr. Brown conducted one-on-one meetings with all nurses in the ICU to present them with information regarding the Union's organizing campaign. On direct examination by Counsel for the General Counsel, Ms. Marshall testified that, "I sat down in [Brown's] office and he basically told me that he knew I was the ring leader and I was the one promoting all this union stuff, and if it didn't stop he was going to get HR involved." (Tr. 193).

Mr. Brown credibly testified that Ms. Marshall's accusations were simply not true. (Tr. 1002). Mr. Brown stated that he was given a list of talking points provided by Human Resources ("HR") and Senior Leadership, and he handed out these talking points and asked if employees had any questions in each of these one-on-one meetings. (Tr. 1003-05). The talking points are set forth at GC Exs. 39-40, and GC-Ex. 39 is the document that was handed to employees. These talking points guided Mr. Brown's conversation with each nurse in the ICU during his one-on-one meetings. (Tr. 1003-05, GC Exs. 39-40).

Mr. Brown specifically recalled going through the fact sheet with Ms. Marshall, and he testified that Ms. Marshall asked him if he had ever worked at a union facility,

and that he answered that yes he had. (Tr. 1005). Mr. Brown testified that he never used the word ringleader and he never said anything about going to HR. (Tr. 1006). In fact, Mr. Brown stated that he never took a position himself on the union issue at CMC since his assignment at CMC was temporary in nature, and he had no particular stake in whether or not the nurses at CMC decided to unionize. (Tr. 1006). Mr. Brown's testimony that he never interrogated or threatened employees and instead followed the talking points as dictated by HR and Senior Leadership was forthright and had all the hallmarks of a credible and genuine recounting of what actually occurred. (Tr. 1003-07).

It is important to note that Mr. Brown has for many years worked as a traveling interim nursing leadership consultant who is placed by multiple consulting companies and assigned to facilities that have an immediate need to fill a vacancy in a key management position on a temporary basis; that he resides in Oregon and has worked in hospitals all over the United States; that he has worked in both union and non-union settings; and that he never intended to take a permanent position with CMC and thus permanently reside in the Ithaca, New York area. (Tr. 990-94, 1006).

Furthermore, Mr. Brown's testimony was corroborated by the other evidence in the record. Mr. Pedersen testified that he has no knowledge that any supervisor or manager ever interrogated or threatened any employees in connection with the Union's organizing campaign. (Tr. 799, 816). He also testified that CMC used outside labor counsel to educate its supervisors and managers throughout the facility about the lawful rules of conduct for them during an organizing campaign, and has conducted similar internal educational forums multiple times in the course of a year, as well as in prior years. (Tr. 799). He also testified that CMC provided members of management with

talking points as to what to say about the organizing campaign to insure that the information being provided was consistent. (Tr. 813; see, e.g. GC-Exs. 39 and 40).

Given this context, Ms. Marshall's uncorroborated assertion that the Director of the ICU ignored the training, ignored the talking points, and blatantly interrogated and/or threatened her concerning her union activity and support lacks credibility. Her testimony particularly lacked the ring of truth insofar as she contended that Mr. Brown threatened her with "get[ting] HR involved" unless she stopped acting as a "ringleader", given that HR was the source of all the leadership training about appropriate conduct for supervisors and managers during an organizing campaign, and that HR was the source of the talking points, as well as being the source of the email communications discussed above that explicitly acknowledged the rights of employees to support and to advocate for unionization.

Ms. Marshall obviously has a large stake in the outcome of this case; whereas Mr. Brown left CMC back in mid 2015 and has no continuing ties to the organization. (Tr. 1006). It is also relevant on the issue of credibility that Ms. Marshall made unfounded accusations of sexual harassment against Mr. Brown as determined by the New York State Division ("NYSDR") after investigating her claims in that proceeding, and therefore has a history of distorting and/or falsifying information involving Mr. Brown to support her own personal agenda; whereas no such evidence exists against Mr. Brown. Mr. Marshall admitted that her two sexual harassment complaints were dismissed by the NYSDR based on a finding of no probable cause to believe that any such harassment actually took place. (Tr. 299-300).

Finally, and perhaps most telling, the General Counsel only produced one other witness out of 350 registered nurses at CMC and 22 in the ICU, who claimed that she

was asked some inappropriate questions about the Union. Ms. Terrie Ellis was a co-worker of Ms. Marshall's who was also a nurse in the ICU. Ms. Ellis testified that in her individual meeting with Mr. Brown, he asked her if she "knew about the union campaign," if she had been "approached about it at work," and if she had "felt pressured or bullied about the Union in any way." (Tr. 428). Conspicuously absent from Ms. Ellis' account was any allegation that Mr. Brown threatened to report her or any other known Union supporters to HR nor with any other unspecified reprisals; nor did she provide any contemporaneous notes, nor any evidence that she reported what happened in the meeting to anyone else at the time. (Tr. 432).

On cross examination, Ms. Ellis admitted that she could not recall the exact wording Mr. Brown used in his statements and purported questions. (Tr. 433-34). This is a critical admission since Mr. Brown denied interrogating or threatening any employees and his meetings were guided by detailed talking points that were vetted by HR and by legal counsel and did not contain any such questions, and which would directly contradict their guidance given to all supervisors and managers including Mr. Brown in training sessions about compliance with the Act. It is also undisputed that the content of the meeting was to provide nurses with relevant information about the organizing process and the Union's campaign, so a statement by Mr. Brown to the effect that, "[in case Ms. Ellis was not aware of the campaign he had several points of information to present to her]," would be entirely lawful and consistent with all of the other evidence in the record. Thus, Ms. Ellis' inability to remember his particular wording could make all the difference in the legal significance of what Ms. Brown said. At best her testimony should have been taken as inconclusive; and when viewed in the context of all the other relevant evidence in the record, including the written talking

points, a fair and impartial factfinder would conclude that such unreliable evidence from Ms. Ellis was insufficient to meet the General Counsel's burden of proof. Instead, the ALJ adopted the undoubtedly rehearsed version she initially testified to on direct examination; while giving short shrift to her equivocation under cross examination (see footnote 20 on page 18 of the ALJ's Decision); and while disregarding the other relevant evidence including Mr. Brown's unequivocal testimony; and all this without ever even broaching the topic of burden of proof.[11]

Other than Ms. Marshall's self-serving testimony and Ms. Ellis' unreliable testimony, the General Counsel failed to produce any other shred of evidence, that either Mr. Brown or any other manager or supervisor ever asked employees about their union sympathies/activities or threatened them with any type of reprisal for supporting unionization at CMC; even though it is undisputed that on the day that Ms. Marshall alleges Mr. Brown threatened her in their one-on-one meeting, Mr. Brown also conducted one-on-one meetings with every other nurse on the ICU, and none of the others ever claimed that he said or did anything inappropriate.

The ALJ's decision to credit Ms. Marshall's testimony over Ms. Brown's is particularly egregious, given that later in his decision when addressing the fact that a key accusation by Ms. Marshall against another manager was discredited by an audio recording of the meeting that Ms. Marshall secretly recorded and thus she was caught in a lie by her own evidence, the ALJ states that therefore he would not credit her testimony on that point; yet he credits her testimony on all other points. (See footnote

[11] The fact that the General Counsel never alleged that Mr. Brown's purported questions of Ms. Ellis violated Section 8(a)(1), as noted in footnote 23 on page 20 of the ALJ's Decision, is also telling and can only be interpreted as a lack of confidence on the part of the General Counsel in the reliability of her testimony, especially when weighed against the countervailing evidence in the record. Yet the ALJ inexplicably failed to address or apparently consider this point in his rush to condemn the Respondent.

54 on page 59 of the ALJ's Decision). In contrast, there is no evidence in the record that Mr. Brown was similarly caught in a lie, or that his testimony was inconsistent in any respect. In commenting on Mr. Brown's testimony, the ALJ stated that he "was not impressed" with Mr. Brown's statements that he had no stake in the outcome of the unionization effort at CMC because other evidence showed that he had taken down union postings in the facility. (ALJ Decision p. 18-19). In a lengthy footnote (See ALJ's Decision footnote 22 on page 19), the ALJ lashes out at the Respondent for arguing that the adverse finding by the New York State Human Rights Division regarding Ms. Marshall's sexual harassment claims against Mr. Brown is relevant to an evaluation of her veracity, on the basis that her claim rested on the showing of a military medical rescue video accompanied by a Marilyn Manson song with some harsh lyrics. Yet the ALJ ignores his own prior acknowledgement in footnote 19 on page 17 of his Decision that, as he put it, "[t]here is the suggestion in the record that the sexual harassment claim ultimately concerned not only the showing of the video but more personal accusations by Marshall against Brown on or about May 8, in a meeting between the two . . . . [which the Human Rights Division] determined to be unfounded".

For these reasons, we respectfully submit that the ALJ's findings are not supported by substantial evidence, and his conclusion that CMC unlawfully interrogated and threatened employees should be reversed, and this portion of the Complaint be dismissed.

F. Respondent Takes Exception to the ALJ's Finding and Conclusion that It Prohibited Employees from Distributing & Posting Union Literature.[12]

The undisputed evidence establishes that CMC afforded pro-union employees every opportunity on a daily and constant basis over a year-long period to solicit one another during non-work time, to obtain signed union authorization cards from one another, to distribute and post pro-union literature throughout CMC's facility, and to engage in extensive tabling in the employer's cafeteria. (Tr. 798, 519-521; 276-278, 280-285; see also GC-Exs. 2(c), (e), (i) and (j)). Aside from the *de minimus* tabling issue discussed above, there is no allegation or evidence that any employees were ever prevented from posting or leaving such material in CMC's facility; nor were any employees told they could not engage in this activity; nor was anyone counseled or threatened with discipline, nor given any discipline, for such engaging in such activity. (Tr. 803-04).

CMC does not dispute that one or more supervisors occasionally took down some pro-union postings, particularly after receiving complaints from other employees about the postings. (Tr. 1007). The occasional removal of such material does not constitute an unlawful interference with Section 7 rights, particularly where, as here, the employer has an established practice of regularly removing non-business related material that is posted or left in its facility. (Tr. 818).

For these reasons, we respectfully submit that the ALJ's Decision on this issue should be reversed and this portion of the Complaint be dismissed.

[12] [12] See ALJ's Decision, Section D.2, pages 20-22.

G. Respondent Takes Exception to the ALJ's Finding and Conclusion that Certain Postings on Facebook Violated the Act.[13]

The ALJ also found Section 8(a)(1) violations stemming from some postings on social media by one supervisor who angrily expressed her feelings because she felt she was being personally attacked and falsely accused of sacrificing her integrity by allegedly lying in a proceeding before the New York State Division of Human Rights ("NYSDHR"). The evidence indicates that employee Scott Marsland posted a comment on Facebook under the alias "Charlie Green", in which he attacked House Supervisor Florence ("Flo") Ogundele's integrity by stating that Anne Marshall was "standing up for what is right" in connection with a claim of sexual harassment she filed against her supervisor, Joel Brown, by "facing down Flo Ogundele" along with other named management representatives and their counsel at an upcoming appearance before the NYSDHR. (GC-Ex. 7). Mr. Marsland acknowledged that he posted more about Ms. Ogundele on Facebook than appears in GC-Ex. 7, and Ms. Ogundele testified that there were more personal attacks in Marsland's postings than shown in the record, including a statement to the effect that she had sold her soul to the devil, which Ms. Ogundele who is a religious person found deeply offensive. (Tr. 727-28, 730-31).

Ms. Ogundele responded in anger by posting a message on Facebook stating that she does not compromise her integrity to lie for anyone; that she cannot be bullied or intimidated; and advising Marsland not to mess with her, and to tell his disciples the same. (GC-Ex. 8). In a subsequent related posting on Facebook, Ms. Ogundele stated that she took her first posting down after being instructed to do so by her boss (i.e. CMC Assistant Vice President for Patient Services Linda Crumb), then proceeded to express

[13] [13] See ALJ's Decision, Section E, pages 22-26.

her distaste for all the "bullshit" going on at work. (GC-Ex. 9).[14]

Ms. Ogundele believed that her comments were personal in nature and not conveyed in her capacity as a management representative of CMC, but in any event when the Medical Center learned about this, she was instructed to immediately take down the offending comments and she received a disciplinary warning for her unsanctioned and inappropriate statements on social media. (Tr. 728-29, 734-35; R-Ex. 4).

To support the contention that the Facebook postings by Ms. Ogundele violated Section 8(a)(1), it must be inferred that: (1) Ms. Ogundele's anger was directed at Mr. Marsland's Union support, even though her postings never mention the Union and she was clearly addressing his defamatory statements toward her; (2) that her vague comments were directed at all Union supporters, even though her comments again do not mention the Union; (3) that her admonitions about messing with her and picking the wrong girl suggested that she would invoke her authority in the workplace to respond, even though her words and tone were personal in nature and said nothing about acting in her capacity as a CMC Supervisor to impose potential discipline or other adverse employment actions; and (4) that any CMC employees who may have read her postings would have reasonably interpreted them as conveying threats of employment-related reprisals due to their Union support, even though the postings say nothing about this. We respectfully submit that such leaps cannot reasonably be inferred from Ms. Ogundele's words. Instead, the true nature of Ms. Ogundele's remarks seems quite

[14] Ironically, although Mr. Marsland (a/k/a Green) had claimed that Marshall was doing the right thing and Ms. Ogundele was doing the wrong thing in connection with the NYSDHR case, after its investigation the NYSDHR determined that Marshall's accusations of sexual harassment against her supervisor were unfounded and dismissed both of her complaints. (Tr. 299-300).

obvious – she took great personal offense from what she perceived as an attack on her personal integrity, and she lashed back in response.

We therefore submit that a reasonable construction of this interaction on social media does not amount to a violation of Section 8(a)(1). Furthermore, while Ms. Ogundele's comments toward Mr. Marsland may reflect a sense of personal animus toward him as a result of his personal attack against her, this cannot be equated with evidence of anti-union animus on the part of CMC.[15] Finally, at most Ms. Ogundele's postings on social media represented an isolated incident, and CMC took prompt and appropriate action upon learning of the postings by instructing her to take the postings down and issuing her a disciplinary warning. (Tr. 728-36; R-Ex. 4).

For these reasons, we respectfully submit that the ALJ's Decision on this issue should be reversed and this portion of the Complaint be dismissed.

H. Respondent Takes Exception to the ALJ's Finding and Conclusion that the October 5 Verbal Warning Issued to Employee Scott Marsland Violated the Act.[16]

The ALJ erroneously concluded that a verbal warning issued on October 5 to Scott Marsland, a nurse in CMC's Emergency Department ("ED") and a known Union supporter, violated Sections 8(a)(1) and 8(a)(3) of the Act.

Specifically, the ALJ found that the conduct at issue constituted protected activity because Mr. Marsland was complaining about not being able to take breaks. However, the undisputed evidence establishes that the verbal warning was based on Mr.

[15] We also note that Ms. Ogundele had no involvement in the verbal warning issued to Mr. Marsland by Amy Matthews more than a month prior to the Facebook postings, and she was not a decision-maker with respect to any of the matters involving Ms. Marshall, all of which also pre-dated the Facebook postings in issue.

[16] See ALJ's Decision, Section F, pages 27-38.

Marsland's decision to demean the competence of two of his two co-workers in a group meeting and his refusal to stop despite repeated instructions from his supervisor to do so. Mr. Marsland did this at a time when the two targets of his disparaging remarks were not present to defend themselves. (Tr. 506-08; GC Ex 34b; GC Ex. 32).[17] These comments were made at a staff meeting on September 24, and there is no evidence in the record to suggest that any other employee joined in these individual concerns or supported the views that Mr. Marsland expressed in this meeting regarding the competency of his fellow nurses. (Tr. 558).

Eleven staff members were present at the September 24 staff meeting led by Director of the ED Amy Matthews. Mr. Marsland's inappropriate conduct began when he asserted that another nurse who he named was not "competent to care for [his] patients." (Tr. 565). Ms. Matthews instructed Mr. Marsland that this was not the proper forum for alleging that another staff member was incompetent (and this was the first she had heard of the issue), and that Mr. Marsland should come to see her. Mr. Marsland persisted and was asked to stop at least three times; however, he persisted to disparage his colleague and damage her reputation by insisting that she was not competent. (Tr. 565-66). He then proceeded to attack the skills of another nurse who he also named in this same meeting. (Tr. 567).

Ms. Matthews decided to issue a verbal warning to Ms. Marsland for disparaging the professional competence of a co-worker in the presence of others and for persisting despite her instructions to stop. (GC -Ex. 34b, p. 5). Upon receipt of the verbal warning, Mr. Marsland acknowledged that his behavior was inappropriate. (GC-Ex.

[17] One of the nurses called Ms. Matthews in tears after hearing about his comments from others. (Tr. 568-69).

34b, p. 6).

Contrary to the ALJ's findings, the evidence clearly establishes that Mr. Marsland was not given a verbal warning for any protected concerted activity; instead, he was disciplined for making demeaning and derogatory comments about his co-workers publicly in front of a number of other staff members.

Ms. Matthews gave credible uncontroverted testimony: (1) that she maintains an open door policy, meaning that any staff member can talk to her if they have a concern about anything; (2) that staff members have come and talked to her about a variety of issues, including issues relating to staffing and scheduling, patient care scenarios, the Electronic Medical Record, the length of time it takes to get physician orders or to get a patient to the floor or mental health holds; (3) that she has never disciplined or counseled an employee for complaining to her about any such issues; (4) that such complaints have never changed her relationship with the complaining employee; (5) that she has never disciplined an employee for complaining about the inability to take breaks; (6) that she never made any attempt to find out who filed a complaint with the New York State Department of Labor about employee breaks; (7) that instead she brought the issue to a staff meeting and said okay we have a problem and let's discuss ideas about how to solve the problem; (8) that her staff meeting in September 2015 was not the first time that a nurse had complained about an issue like scheduling, breaks or conditions on the unit; (9) that employees express complaints/concerns at every staff meeting; and (10) that she has never disciplined anybody for voicing a legitimate concern; but (11) that prior to Mr. Marsland "nobody has voiced a concern that has torn down another person in front of a group of people" and her verbal warning was based on his inappropriate conduct in publicly portraying a co-worker "in a very bad light." (Tr.

582-587).

Despite acknowledging that Mr. Marsland's conduct was "out of line", he nevertheless concludes that it was protected and not sufficiently opprobrious to warrant discipline. CMC respectfully disagrees with the ALJ's conclusion, and we therefore submit that his decision as to the verbal warning should be reversed and this portion of the Complaint should be dismissed.

I. Respondent Takes Exception to the ALJ's Finding and Conclusion that the June 26 Suspension of Ms. Marshall Violated the Act.[18]

At all relevant times Anne Marshall was a registered nurse in CMC's ICU. It is undisputed that at all relevant times Ms. Marshall was openly supportive of unionization, and that CMC was aware of her pro-union viewpoint and her organizing activities.

The ALJ found that CMC discriminated against Ms. Marshall due to her Union support and acted with a retaliatory motive when it suspended her on June 26 due to an incident of misconduct; when it issued a documented verbal warning to her on July 10 due to another incident of misconduct; when it demoted her from her Charge Nurse position to a regular Staff Nurse position on August 31 due to further acts of misconduct and a failure to carry out her Charge Nurse responsibilities; and when it issued an unfavorable performance evaluation to her on October 30.

However, the clear and convincing evidence in the record establishes that each one of these actions was based on legitimate reasons; and that the actions were not motivated by a sense of retaliation; but rather were genuinely viewed as an appropriate and necessary response to her misconduct in the performance (or non-performance) of her duties as a Charge Nurse. At all times CMC was fully aware that any adverse

[18] See ALJ's Decision, Section G.1.b., pages 39-51.

actions against Ms. Marshall could be perceived as retaliatory due to her active role in the Union's organizing campaign, and therefore proceeded very cautiously, took a measured approach, and was very reluctant in taking corrective action. The overwhelming credible evidence establishes that the actions in issue were NOT taken against Ms. Marshall because of her protected activity, but rather were taken IN SPITE OF her protected activity because her behavior was so poor that it could not reasonably be overlooked.

The evidence in support of the legitimate reasons for the actions involving Ms. Marshall consists of extensive detailed and highly specific contemporaneous documentation from multiple witnesses; consistent and credible testimony from multiple witnesses all corroborating one another, including one key witness who no longer works for CMC; and various grudging acknowledgements and admissions from Ms. Marshall, and in a couple of instances from other witnesses called by the General Counsel.

That evidence stands in contrast with self-serving testimony by Ms. Marshall whose demeanor as a witness demonstrated a general lack of credibility, particularly when challenged on cross examination; whose testimony was inconsistent and contradictory in several respects; who has a demonstrated history of making unfounded accusations against one of her former CMC managers in the context of an unmeritorious legal proceeding against him for alleged sexual harassment; as well as the general absence of any corroborating testimony from any other witnesses; and the absence of any contemporaneous documentation supporting her version of events.

For all of these reasons, CMC respectfully submits that contrary to the ALJ's findings and conclusions, the overwhelming weight of the evidence supports the legitimate reasons for each decision concerning Ms. Marshall's employment, and that

the Section 8(a)(3) allegations involving her must therefore be dismissed.

Ms. Marshall has acknowledged and admitted that one of the responsibilities of Team Leaders and Charge Nurses at CMC is to make calls to off-duty nurses to ask if they are willing to come in to help meet patient needs by filling holes in the schedule and/or because of changes in patient census or patient acuity. (Tr. 309).[19] However, her testimony relating this point was very revealing. When first asked on direct examination by Counsel for the General Counsel who is responsible for filling holes in the schedule, Ms. Marshall provided a seemingly rehearsed response incorporating deliberate vagueness, that "Ultimately it's the director, but we all try to help." (Tr. 154-55). Later when asked how often she personally has tried to fill holes in the schedule when in her role as Charge Nurse, she responded multiple times a week.[20] She went on to testify that normally "we" look at the next shift coming on and try to fill those holes first, and that "we would text people and call people". When Your Honor interjected by asking Ms. Marshall who the "we" was that she was referring to, she responded by acknowledging that it just meant the Charge Nurse or Team Leader for that shift. (Tr. 155-56).

The reason all of this is significant is that a consistent theme of Anne Marshall's – both in her testimony in response to questioning by Counsel for the General Counsel, and at the time of the underlying events when she was confronted by her managers about her behavior in her role as Charge Nurse – was that the lack of a written job description for Charge Nurses left her unclear as to what her responsibilities consisted of; that she was unclear and confused about what her supervisor's expectations were

[19] Every nursing unit has either a Charge Nurse or a Team Leader on every shift. Charge Nurses are permanently designated as having charge responsibilities. Team Leaders are regular staff nurses who temporarily assume charge responsibilities in the absence of a Charge Nurse.

[20] Ms. Marshall's regular work schedule consisted of three 12-hour shifts per week. (Tr. 155).

regarding the role of Charge Nurses, particularly when it came to making calls to try to secure more staffing; that the expectations seemed to change over the course of 2015 when a series of relatively short-term Interim Directors managed the ICU; and that securing additional staff was really not her problem, but instead was her supervisor's problem. In reality, however, a key responsibility and consistent expectation for the role of Charge Nurses at all times has been to call off-duty nurses to try to secure more staffing on an as-needed basis and as directed by the Director / Interim Director of the ICU, and that this occurred on almost a daily basis.[21]

The detailed events leading up to the June 26 suspension are fully described in the contemporaneous documentation consisting of R-Exs. 1(a) thorough (m), R-Ex. 2, and R-Exs. 6 through 12, as well as ALJ Ex. 1. These events and the evidence gathered and relied upon in the resulting investigation were also described in the testimony primarily by Respondent witnesses Norman Joel Brown, Florence Ogundele, and Linda Crumb. In summary, after some problems with Ms. Marshall's behavior beginning on June 25, on June 26th, the ICU where Ms. Marshall was working as Charge Nurse was experiencing a staffing crisis. The situation was emergent because a very critical patient needed to go from surgery to the ICU, and the patient was at risk for being transferred out to a different hospital unless additional ICU nurses could come in. Interim ICU Director Joel Brown conferred with the House Supervisor Flo Ogundele about the situation and both of them discussed the situation with Ms. Marshall in her capacity as Charge Nurse. Mr. Brown asked Ms. Marshall to start making calls to see if

[21] We also note that another witness for the General Counsel, Christine Monacelli, is an ICU Staff Nurse who acknowledged on cross examination that it was the role of a Charge Nurse and/or Team Leader to make calls to get nurses to come in to fill holes in the schedule or because of a change in census or patient acuity. (Tr. 456-57). Ms. Monacelli also confirmed that Anne Marshall had called her at home for that purpose while serving in the capacity of Charge Nurse on multiple occasions. (Tr. 448).

any nurses would come in. Ms. Marshall responded by stating that had already made the calls and no one was willing to come in. Mr. Brown then went to his office to start making calls, and the first nurse he called agreed to come in immediately. Mr. Brown then went to Ms. Marshall and asked her for a list of the nurses she had called so he would not be duplicating her efforts by calling anyone twice. Ms. Marshall then stated to both Mr. Brown and Ms. Ogundele that there was no list because she really hadn't made any calls. Thus, Ms. Marshall lied the first time when she said she had already made calls and no one would come in, and she exhibited a lack of cooperation by effectively refusing to assist with an emergent situation that could have placed a patient in jeopardy. As a result, Ms. Marshall was suspended for the remainder of that shift and the next shift. This had everything to do with her misconduct and nothing to do with her Union activity.

The ALJ's conclusion to the contrary relies on the discredited testimony of Ms. Marshall, and is not supported by the substantial credible evidence in the record. For these reasons, we respectfully submit that the ALJ's Decision with respect to the June 26 suspension should be reversed and this portion of the Complaint should be dismissed.

J. Respondent Takes Exception to the ALJ's Finding and Conclusion that the July 10 Verbal Warning Issued to Ms. Marshall Violated the Act.[22]

On July 3rd, Ms. Marshall engaged in an aggressive and confrontational dialog with her immediate supervisor, Mr. Brown, about getting Ward Clerk help. Ms. Marshall proceeded to angrily follow Mr. Brown around violating his personal space and blocking his movements, and within a few minutes thereafter she confronted him by again and

[22] See ALJ's Decision, Section G.2., pages 51-57.

remained standing in the doorway to his office demanding his attention despite repeatedly being asked by Mr. Brown to leave until finally he had to threaten to call security. Ms. Marshall received the July 10 documented verbal warning for this unacceptable behavior. Once again, the verbal warning had everything to do with her misconduct and nothing to do with her union support.

Once again based on the credible evidence in the record and for all of the reasons discussed above, we respectfully submit that the ALJ's Decision with respect to the July 10 verbal warning should be reversed and this portion of the Complaint should be dismissed.

K. Respondent Takes Exception to the ALJ's Finding and Conclusion that the August 31 Removal of Ms. Marshall from Her Team Leader Role Violated the Act.[23]

In yet another series of incidents on August 28th, Ms. Marshall exhibited extremely rude and disrespectful behavior upon first meeting her new immediate supervisor, the brand new Interim Director of the ICU, Sandra Beasley, by flipping her middle finger at her. That same morning, Ms. Beasely made a point of telling Ms. Marshall that she wanted to go with her to the morning bed meeting so Ms. Beasley could become more familiar CMC operations. When the time came for the bed meeting, Ms. Marshall left the unit and went to the meeting on her own without finding Ms. Beasely so they could go together. When Ms. Beasely expressed to Ms. Marshall that she was upset by her lack of consideration, Ms. Marshall responded by saying "you're not a baby, and I don't have to take you by the hand and lead you around." Later that same day, Ms. Beasely asked Ms. Marshall who was Team Leader to make calls to

[23] [23] See ALJ's Decision, Section G.3, pages 58-64.

secure additional staffing for the weekend. Ms. Marshall responded by saying no one is going to come in because we're all tired and overworked. Ms. Beasely told her that she still needed to make the calls. Ms. Marshall proceeded to argue about it stating that she didn't know the expectation because she did not have a job description, and ultimately Ms. Marshall told another employee to bring the schedule with holes in it to Ms. Beasely instead of trying to work on filling the holes herself. All of this occurred on the very first day that Ms. Marshall met the new Interim Director of the ICU. As a result of her unacceptable behavior, Ms. Marshall was demoted from the Team Leader and Charge Nurse role and returned to a regular staff nurse role. Once again this decision had everything to do with her misconduct and nothing to do with her union support.

The nature and extent of Ms. Marshall's behavior resulting in her suspension, verbal warning and eventual demotion were somewhat unprecedented, but CMC was able to find at least five other similarly-situated employees who were similarly disciplined for engaging in roughly comparable violations for failing to uphold professional standards/Code of Conduct. (R. Ex. 14). This evidence includes a written warning for a lost temper and foul language; a 3-day suspension for violating the employee conduct policy; a final written warning for explosive and aggressive profanity and a suspension for exhibiting threatening behavior toward peers and criticizing co-workers; and a verbal warning for a heated argument. (R. Ex. 14). These examples demonstrate that certain standards of performance and behavior have been expected and shortfalls have been addressed through formal disciplinary action over a period of many years and long before the current Union organizing campaign.

For all of the above reasons, we respectfully submit that the ALJ's Decision with respect to the August 31 removal of Ms. Marshall from her Team Leader role should be reversed and this portion of the Complaint should be dismissed.

L. Respondent Takes Exception to the ALJ's Conclusion that a Certain Rating Contained in an October 30 Performance Evaluation of Ms. Marshall Violated the Act.[24]

With respect to Ms. Marshall's 2015 performance evaluation, normally Department Directors perform the annual performance evaluations for the staff nurses, but in 2015 Assistant Vice President of Patient Services Linda Crumb performed the performance evaluations for the ICU staff nurses because the longstanding former director had left and the interim directors who followed lacked sufficient time upon which to base an evaluation. Thus, Crumb advised the ICU nurses in a staff meeting that for 2015 they would start with the same rating as they had in 2014, then she would review the personal accountability section of the evaluation and set goals for next year. (Tr. 98-100, 932).

The personal accountability section includes licensure, mandatory attendance and work behaviors, among others. (Tr. 933, GC Ex. 29(h) and (g)). For the personal accountability section in 2015, Ms. Marshall lost 1.0 points for demonstrating unacceptable behavior. This loss was based on her dishonesty regarding call-ins on two separate occasions and her dishonesty during the evaluation period. (Tr. 938). This loss of 1.0 point had absolutely nothing to do with her Union support and everything to do with her failure to provide truthful information regarding staffing

[24] [24] See ALJ's Decision, Section G.4, pages 65-69.

primarily during the events leading up to her suspension. (Tr. 938). This resulted in her lower evaluation for 2015. (Tr. 938-39). Contrary to Counsel for the General Counsel's assertion that Ms. Marshall was the only ICU Nurse whose 2015 performance evaluation was not identical to her 2014 performance evaluation, Ms. Crumb's uncontroverted testimony was that several nurses had lost 1.0 point from their 2014 to their 2015 overall evaluation score for various reasons. (Tr. 938).

For all of the above reasons, we respectfully submit that the ALJ's Decision with respect to the October 30 performance evaluation of Ms. Marshall should be reversed and this portion of the Complaint should be dismissed.

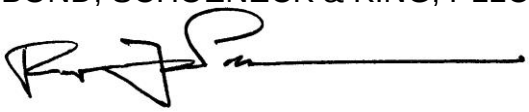
IV. CONCLUSION

For the reasons stated above, the Respondent Cayuga Medical Center respectfully requests that the ALJ's Decision be reversed and that the Amended Complaint be dismissed in its entirety.

Dated: November 25, 2016

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC



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